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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 123

VIRGINIA WILLYS LUCOM and
WILSON C. LUCOM,

Petitioners,

v.

ATLANTIC NATIONAL BANK OF
WEST PALM BEACH, FLORIDA,

Respondent.

RESPONSE TO PETITION FOR CERTIORARI

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Supplemental Statement of the Case

The petition seeks to infuse a minor question under state statutes of limitation with the dignity of the civil rights battle. Petitioners' argumentative Statement of the Case as a gross violation of civil rights requires that we correct some of the erroneous statements of fact and law with which they have loaded their Statement, before we can reach that small point of limitation law. We supply this Supplemental Statement to disabuse the Court of

petitioners' presentation of the facts as involving "railroading" (Pet. 17) whereby the petitioner wife was "erroneously charged with being mentally incompetent" (ib 18), and "fraudulent concealment" (ib 28) whereby to toll the limitation statutes.

I. *The petitioner wife's incompetency:* — The record leaves no doubt that when this guardianship started in September 1953 the petitioner wife was in fact incompetent. She was institutionalized in Philadelphia, under electric and insulin shock therapy for a recurrence of the paranoid schizophrenia (RI, 343) that had led to an earlier 1952 guardianship not here in litigation, from which she had been — by hindsight prematurely — restored just a few months before in May 1953 (RI, 46, 72).[1] The complaint never even alleges factual competency. (RI, 8, 15, 180)

Her mental state was so bad that the attending physicians felt it would harm her even to bring her to the Philadelphia courtroom (RI, 344, 355). One psychiatrist testified that the night before the hearing there, notwithstanding improvement after 14 insulin shock treatments, she still thought she was married to Franklin D. Roosevelt,

[1]Petitioners' statements that the wife's first hospitalization in 1952 resulted from her son's "efforts to seize control of her financial affairs by having her declared mentally incompetent" (Pet. 5), and that during the wife's second hospitalization in 1953 the son "continued to demand $75,000 from her; upon her refusal he succeeded in obtaining $10,000 without her authority from her brokerage account in New York" (Pet. 6), have no foundation in this record. The point of the latter charge is the further assertion that a law firm (alleged coconspirators—RI, 180) that later became counsel to the bank "represented the son in these various efforts to obtain money from the petitioner wife" (Pet. 6). The record here shows, on the contrary, that the attorneys were not consulted until just before the second hospitalization, and that they urged the son to abandon any attempt to get money from his mother (RI, 483-8).

Jr., a daughter was placing baby chicks in her hospital room to annoy her, her dead parents were alive, her only son John had a twin brother who visited her at the hospital (RI, 349ff).[2]

Her plight demanded not just medical attention for her person but the legal protection for her property that the guardianship supplied. One of her ex-husbands, Mark Martin, had obtained from her $37,000 and a general power of attorney to himself, both during the short period between her restoration in the spring of 1953 after the first guardianship, and her readmission to the mental hospital in Philadelphia that summer just before the instant second guardianship (RI, 233-7). Even after her readmission Martin got a check for $50,000 from her, but the hospital staff intercepted the check and she got it back (ib235-6, 359).

The physician who testified about the Martin check also testified that she had difficulty understanding about her finances and her property and that she did not even seem to be aware that Martin was handling her money (RI, 358: cf 368). Thus the guardianship was essential to protect her estate from depredation.[3] These facts demonstrate that she was then patently incompetent within the statutory definitions of either Pennsylvania or Florida.[4] They also explain why the record shows no attempt by peti-

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[2]Further on her Mrs. Franklin D. Roosevelt, Jr. delusion, see her October 1953 letter (RI, 316-7), acknowledged in her deposition (RI, 230 ff, 295-6).

[3]The guardianship petition recited the danger that Martin would dissipate the estate, RI, 48.

[4]These definitions, both turning on inability to manage one's property, Pa. P. L. 612, June 28, 1951 ¶102(3) [cited as P.L. 158 in the opinion below, Pet. App. 2a], FS §744.03(5), are printed in the Appendix infra, p. 1a, 2a.

tioners at all in any state court, and no serious attempt below, to prove up her competency.[5]

II. *The Pennsylvania adjudication that the petitioner wife was "mentally ill":* — Having by way of introduction presented the false picture of a competent woman railroaded, petitioners then (Pet. 6-7) attack the Pennsylvania habeas corpus proceeding that led to the Florida guardianship. They say — incorrectly — that the proceeding was "nonadversary".[6] They find fault that in the habeas corpus order Judge Bok found the petitioner wife "mentally ill" but declined to find her "incompetent",[7] a factor which we shall show the Florida court considered and held immaterial. Indeed they fail to disclose that it would have been beyond the statutory jurisdiction of a Pennsylvania court to make the incompetency adjudication in the absence of a showing that she was either a Pennsylvania resident or a Pennsylvania property holder.[8] See *In re Card*, 177 Pa. Super. 502, 110 A2d 856 (1955). Thus the Pennsylvania statutes simply do not permit what pe-

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[5]On this score the record contains only her pathetic self-serving 1963 affidavit (RI, 380ff), in which she purports to demonstrate "evidence of my competence" in 1953 by appending two lucid letters she wrote while in the mental hospital, one a few weeks before and one a few weeks after the "Mrs. Franklin D. Roosevelt" letter, p. 3 n. 2 above.

[6]Her personal counsel, the late J. W. Salisbury of Palm Beach, who later on became her guardian ad litem in the Florida proceeding, and still later cocounsel for the bank at her own suggestion, appeared for her (RI, 336, 337, 345-6, 348, 360; RII, 258-9). He is named in the complaint as a coconspirator (RI, 181 ff.)

[7]The complaint alleges (¶¶6, 16, 18-RI, 19, 23, 189) that the Pennsylvania order did not adjudicate "incompetency" but only "mental illness," and would have been procedurally insufficient as an adjudication of incompetency.

[8]The Pennsylvania incompetency procedure statute, P.L. 612, June 28, 1961, §301, is printed in the Appendix infra, p. 2a-3a.

titioners suggest was lacking here, and Judge Bok, commenting on the fact that she was a Floridian without Pennsylvania property, and with Florida property on which Florida guardianship was contemplated (RI, 338, 363), did what Pennsylvania law let him do.

Moreover petitioners made this very attack (and others) on the 1953 Pennsylvania habeas corpus, by a 1954 Pennsylvania declaratory judgment proceeding (RI, 60, 70ff). The record here does not show the failure of that attack, but we state the off-the-record fact of its failure, as a plain inference from this record. Had petitioners obtained their declaratory judgment in Pennsylvania they would not have had to invite either Florida or federal courts to speculate about Pennsylvania law.

III. *The Florida adoption of the Pennsylvania adjudication:* — Petitioners assert that the Florida adoption of the Pennsylvania "mentally ill" adjudication in lieu of an independent Florida incompetency proceeding violated Florida law and thus made the guardianship "null and void" (Pet. 8-9). They rest this plausibly enough on quotation of the statute, FS §744.31, that forbids guardianship of a Florida *resident* without separate incompetency adjudication under still another statutory procedure that no one contends was here used. But the District Court's opinion (Pet. App. 18a) has already brought to their attention —and we submit they should have brought it to this Court's attention before making loose charges of "railroading"— that the Florida Supreme Court has held that the statute on which they rely need not be complied with where the Florida resident is temporarily hospitalized outside the state: such a person is held to be subject to the *non-resident*

provisions of the Florida guardianship law. *In re Cameron's Estate*, 158 Fla 91, 28 So2d 110 (1948).

Under this non-resident procedure, FS §744.19, the District Court below pointed out, Pet.App. 18a-19a, a Florida guardian may be appointed simply on exemplified copy of an adjudication of "unsoundness of mind" in the state of hospitalization, which is "prima facie proof of such incompetency".[9] This is just what took place here. RI, 52, 56, 336ff.

IV. *The asserted newly discovered evidence of the respondent bank's participation in "conspiracy":*—Petitioners complain of the refusal of the courts below to grant their Rule 60(b) motion, to set aside the 1963 summary judgment for alleged evidence of fraud and conspiracy that they say they later discovered in 1963 - '64.[10] Petitioners have not included, among the opinions from several courts they reprint in their petition, the opinions of the District Court disposing of that evidence (from 1700-plus documents, R III, 458, and two days' deposition testimony of the bank's trust officer, R II, 19ff). In those opinions the District Court characterized that evidence as "a collection of insignificances" that "establishes no fraud at all", and their motion based thereon as "scandalous" and "frivolous"

[9]Petitioners' quotation of FS § 744.19 (Pet. 9) stops neatly short of the operative words on which the District Court turned its rejection of their contention, i.e., the sentence "Such adjudication shall constitute prima facie proof of such incompetency," quoted in the District Court's opinion (Pet. App. 19a n. 7).

[10]It should perhaps be explained that the occasion for the new evidence was that the 1963 order, which petitioners and we alike call a summary judgment, was in fact a partial summary judgment, and it was discovery proceedings under the surviving portion of the case (Count II, ¶7: RI, 29) ultimately dismissed (RI, 514; RIII, 612 ff, 615; Pet. App. 8a) that turned up the evidence in question.

(RIII, 608-9, 612-7, 631-2).[11] In their petition here, thankfully, they have abandoned most of that vast mass of material, to concentrate on one piece of the asserted new discovery, viz., that the bank knew of an alleged [1954] plan of the son, represented by one of the two law offices that represented the bank, to have his mother recommitted, to petition for his own appointment as guardian of her person, and to have petitioners' marriage annulled, all at a time when the trust officer and another of bank counsel considered this lady competent (Pet. 5, 14).

But petitioners' Statement omits all mention of the event that triggered off most of the events there recited, and superseded the until then prevailing belief by all concerned that she was competent again: the petitioner wife suffered a sudden mental relapse (RIII, 443).

At this time her personal physician and her personal attorney (who was also, it will be recalled, then cocounsel for the bank, supra p. 4 n. 6) had even started routine proceedings for a Florida judicial declaration of restoration to competency (RIII 443-4). But when this physician and a consulting phychiatrist determined she had relapsed, the attorney and the physicians abandoned the restoration proceeding, the petitioners were married after a reported acquaintance of only a few days, the son initiated the obviously appropriate action by way of petition for personal

[11]For some reason that we have never comprehended, petitioners have included in the record-on-appeal some of not only their but our District Court briefing on this motion (RIII, 398-443, 489-501, 509-527, 574-595). This may at least have the utility in this Court of pointing to the evidence covered by the District Court's remarks.

guardianship looking toward annullment; and all this was reported to the bank[12] (ib.).

In their Argument petitioners treat the newly discovered evidence as discovery of a concealment that serves to toll the fraud statute of limitations (Pet. 28-9), and this we too shall argue below as a matter of law. Whether or not the facts of this "conspiracy", even as petitioners present them in their Statement, would survive a motion for summary judgment or for directed verdict is not material at this stage of the case. See *United States v. Falcone*, 311 US 205. But we do deem material enough to set straight in this Supplemental Statement petitioners' misleading presentation of the bank as cynically standing by in the face of conspiracy to treat its ward as crazy although the bank "knew" (Pet. 5) her to be sane. By reciting the trust officer's initial opinion that the wife was competent, and suppressing the experts' later (and of course controlling) opinion that she had relapsed into incompetency as well as the trust officer's awareness of that expert opinion, petitioners have produced a lopsided treatment of the facts. This we cannot let pass in silence, lest it achieve its patent purpose of inducing this Court to believe that the local and technical ruling below hides miscarriage of justice.

To restate this head of the case succinctly, a bank that accepted and discharged a guardianship "in good faith" as the Florida Supreme Court found (Pet. App. 27a), and

[12]The reports to the bank, as they stand in the record, do not show precisely when the bank became aware that the physician was of the opinion to which he testified a few days later, viz., that the sudden relation between petitioners contributed to the relapse (RI, 456-8, 462-5). But the son's action clearly expressed an entirely legitimate concern that his mother, once before in this record subjected to undue influence by another man in a prior episode of mental illness, supra p. 3 n. 3, might be victimized again.

turned back in 1955 more assets than the ward had when the bank took over in 1953 (RI 334-5), is still being harassed in this Court in 1966 on factual allegations of concealment of fraud, that the District Court and the Court of Appeals have both found groundless.

SUMMARY OF ARGUMENT

1. The Court of Appeals decision rejecting petitioners' contention that this case is governed by a Florida limitation statute that had not run, and accepting respondent's contention that it was governed by another Florida limitation statute that had run, is one of those matters of local law that this Court does not review on certiorari. Moreover the judges who wrote the opinions below at both the District Court and Court of Appeals levels rejecting petitioners' contentions as to state law are particularly experienced in Florida law, so that the case is governed by this Court's practice of especial deference to such opinions. The case does not acquire weight for certiorari purposes from the fact that it charges 14th Amendment violation, for it falls within this Court's settled doctrine that tort suits on even 14th Amendment rights are barred when the appropriate state limitation statutes run.

2. Petitioners' contention that no statute of limitation can operate at all on the void judgment count because a void judgment can be collaterally attacked at any time, was defeated years ago by their failure to take certiorari when the Florida Supreme Court rejected their underlying contention that the judgment was void. That court, having the parties to the contention of voidness before it,

had jurisdiction to determine its own jurisdiction, so that on default of direct resort to this Court then, the assertion of voidness is no longer available in any court.

3. Petitioners claim that the courts below erred in not allowing a jury to pass on their contention that the limitation statute on their cause of action for fraud and conspiracy was tolled by concealment. Since this was raised as a matter of newly discovered evidence, after the basic summary judgment against them, this matter was largely discretionary with the District Court. But the District Court's purely factual ruling that the new evidence "establishes no fraud at all" is not a matter for certiorari; and even were it erroneous no right to jury is involved because petitioners have never introduced any evidence to controvert respondent's proof that (1) the documents petitioners assert were concealed were many times tendered to their counsel for inspection, and that (2) petitioners knew all along the substance of what the documents recited. Hence there was no factual question of new discovery to go to a jury at all.

ARGUMENT

I. There is no occasion to review the lower courts' choice of governing limitation statute, because this is a matter only of state law.

The petition acknowledges a "traditional reluctance" of this Court to grant certiorari for asserted federal court error as to state law (Pet. 18). One of its authors has indeed elsewhere stated the point less hesitantly, i.e., that

absent "an exceptionally clear showing of error" this Court "refuses to add its conjecture to that of the court of appeals" and therefore "uniformly declines review" of such cases (*Stern & Gressman, Supreme Court Practice*, 3rd Ed, 134). The two cases petitioners now cite as guides for exception to that uniform declination happen not to involve either petition or decision on the ground of error of state law.[13] Nor, we submit, is the instant case a proper occasion for exception: —

(1) It will be unnecessary to rehash the Florida case law discussed in the opinions below. This Court has maintained an especial deference to the local law decisions of federal judges of large experience in that law, such as the authors of the opinions below, Senior District Judge Emett C. Choate of Miami and Senior Circuit Judge Warren L. Jones of Jacksonville. For this Court to enter upon review of such decisions they must appear to be "plain error", *Francis v. Sou. Pac. Ry. Co.*, 333 US 445, 447-8; "unreasonable", *Propper v. Clark*, 337 US 472; "clearly wrong", *The Tungus v. Skovgaard*, 358 US 588. The opinions below disclose that their authors were quite aware that the precise question of the order in which these two Florida

[13]Reading the petitions in **Dick v. New York Life Ins. Co.**, 359 US 437, and **Moore v. Ill. Cent. Ry. Co.**, 312 US 630 (Pet. 18), will confirm that in neither was error of state law even asserted, but error of federal court procedure only. In **Dick**, this Court had no doubt that the Court of Appeals "appears to have applied the state standard" (at 445), but reversed because that court committed the procedural error of "resolving a factual dispute" (ib) in taking from the jury a case that the District Judge had left with them. In **Moore**, the reversal was not for misinterpreting state law but for presuming to interpret state law at all, on removal after remand, once state law had been announced by the state's highest court as the law of the very case: "The Mississippi Supreme Court had the power to reconsider and overrule its former interpretation, but the court below did not" (at 632).

limitation statutes should run was novel (Pet. 4a, 23a, n. 13;) and their rejections of petitioners' contention on that novel question, each after painstaking independent analysis of the Florida precedents on other limitation statutes, cannot be fairly read, within the quoted tests, as "plain error", "unreasonable", "clearly wrong".

(2) Faced with the impassable authority of the opinions below, petitioners resort to three assertions of Florida law not already explicitly rejected in those opinions. Petitioners can be shortly shown wrong on all three: —

First, they advance *Am. Surety Co. v. Andrews*, 152 Fla 638, 12 So2d 599 (1943) (Pet. 23n.), as holding the four-year general statute inapplicable to suit, as here, by former ward against discharged guardian for acts [improvident investments] more than four years before suit was filed — although the statute is not mentioned in that opinion. They fail to disclose that the other report of the case, s.n. *Turner v. Andrews*, 143 Fla 88, 196 So 449 (1940) makes plain that the statute could not have been involved; for the suit was not pleaded as a devastavit for making the investments themselves, but for an improper final accounting on them made less than four years before suit filed.

Second, in support of their conjecture that guardianship itself tolls or displaces the Florida general limitation statute during the period of guardianship, petitioners twice assert that suit by ward against guardian "could only have been brought *after* the final discharge of the guardian" (Pet. 23, their emph.; rephrased ib26). But the ward's right to sue the guardian during guardianship was classic

common law, *Co. Litt.* *54a, even attributed to the 13th century, *Coke, 2nd Institute* *306, Comm. on Stat. Gloucester, 6 Edw 1 c. 5. That right persists in Florida, for the county judge's court sits to hear "complaints by wards against guardians", FS §744.06(1); and *In re White*, 140 So2d 311 (1stD1962) is just such a suit by restored ward against guardian *during* guardianship. Although petitioners turn this point on reference (Pet. 22) to the "restrictions placed by law on the right of a ward to sue his guardian during the period of guardianship", *Beck v. Barnett Natl. Bk.*, 117 So2d 45, 49 (1stD1960), *White* indeed makes clear that these are restrictions only on in what court and in what name the ward sues, not at all on suit during guardianship.[14]

Third, petitioners cite *Bloxham v. Crane*, 19 Fla 163, 172 (1882) and *Fisher v. Guidy*, 106 Fla 94, 142 So 818 (1932), as holding that the trust relation between guardian and ward tolls the four-year statute for the duration of the guardianship (Pet. 26). They briefed this below, RI, 394ff. Why the courts below deemed these cases too far out of point to mention is obvious on reading the cases. The wards' suits were to enforce wards' trust rights in wards' funds held by guardians; but that sort of suit falls within a specific clause of the general limitation statute that exempts suits "with respect to any moneys or property held or collected by any *** trustee", L. 1872, c. 1869 §15,

[14]Mrs. White, just like Mrs. Lucom here, was a restored ward suing in her own name, 140 So2d, at 312. For an unrestored ward, the statutory right to sue the guardian is developed in FS § 744.61 (App. infra, p. 1a), as one of three sorts of suits that occur during guardianship: third-party suits by or against the ward are conducted in the guardian's name, but the court is to appoint a guardian ad litem for suit "by the guardian against the ward or vice versa," a provision that is nonsense except during guardianship.

now FS §95.02, quoted as controlling in *Bloxham*, at 171-2. Here, however, the suit is not to enforce the trust "with respect to any moneys or property held or collected", but in tort for damages.[15] Such statutory tolling of a trust suit does not entail tolling the instant tort suit, any more than the statutory tolling of a suit by an insane person to recover real estate tolls his tort suit for slander of its title, *Carey v. Beyer*, 75 So2d 217 (Fla 1954). It is granite Florida law that each tolling statute is specific, and none may be read the least bit beyond its very language. *Faulk etc. v. Harper*, 62 So2d 62 (Fla 1952); *In re Aron's Estate*, 118 So2d 546 (3dD1960).

Without further exploration of the detail of these three contentions of Florida law, such as would be appropriate to briefing on the merits, we submit that plaintiffs have failed to demonstrate that "exceptionally clear showing of error", *Stern & Gressman*, loc. cit., requisite for certiorari.

(3) Since petitioners know the question they raise is otherwise too provincial to bring to the attention of this Court, they seek to inflate it to "significance and substantiality" (Pet. 16), by casting themselves as "proxies" (ib) to vindicate the 14th Amendment rights of the mentally ill. But it is long settled that a civil suit for damages for violating even 14th Amendment rights is barred when the appropriate state limitation statute runs. *O'Sullivan v. Felix*, 233 US 318.[16]

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[15]Moreover, the trust relation terminated in 1955 on approval of final accounting and turnover of the ward's assets against receipt (RI, 85, 88). The retention of small funds after final accounting, criticized Pet. 10 n. 7, is authorized by statute, FS § 746.13(2).

[16]Hence it is not necessary to debate with petitioners the correctness of the view of the Court of Appeals that no 14th Amendment question, because no state action, was here involved (Pet. 30). As petitioners note elsewhere, that was dictum (ib 15).

II. There is no occasion to review petitioners' constitutional claim that the case arises from a void order, because the petitioner wife failed to attack the order by certiorari when the state's highest court affirmed it.

Petitioners assert that even if the courts below selected the right state limitation statute, no limitation statute at all can constitutionally operate because the whole case originates in the guardianship order they deem void and therefore subject to collateral attack "at any time" (Pet. 27-8). In restating the case, supra p. 4-6, we have reviewed some of the reasons which led the courts below to reject petitioners' contention that the order was void. But even were their point sound, petitioners cannot now reassert it in this federal court suit, for the wife claimed it and lost it in her state court suit over guardianship fees.

(1) Petitioners say "None of the courts below, federal or state, have passed upon or denied petitioners' claim that the appointment order was in fact void although the Florida Supreme Court *** conceded that there is 'some merit' to petitioners' arguments" (Pet. 28 n. 19; also 33). The quoted statement is erroneous as to the District Court below (see Pet.App. 15a). More important, it is erroneous as to the Florida courts. The petitioner wife made this voidness claim in the Florida courts, and they decided it against her.[17] In the Florida Supreme Court she assigned as er-

[17]Petitioners' paraphrase of the Florida Supreme Court opinion begs the question: that court did not, as petitioners assert, concede "that there is 'some merit' to petitioners' arguments" as to voidness, but only that

rors that the appointment was "invalid and void", that the appointment procedure deprived her of "due process" under the 14th Amendment and the like provision of the state constitution, and that therefore no guardianship compensation could lawfully be awarded (RI, 10lff-¶¶4, 8, 10).[18] When the Florida Supreme Court, notwithstanding those assignments, refused to hold the bank and its attorneys volunteers not entitled to statutory guardianship fees from the guardianship estate, that court necessarily held as a matter of law that even assuming irregularity in the appointment procedure, this was not so substantial as to make the guardianship void and the adjudication of guardianship fees the taking of property without due process that the assignments claimed.

To be sure, it would have saved all concerned much trouble had that phase of the opinion been more detailed. But the Florida Supreme Court made clear enough that it was deciding rather than declining to decide the contention of voidness, for that court specifically noted it,[19] and by allowing the compensation (subject to recomputation of the attorney fees) disposed of that contention with the rest of the case.[20] The petitioner wife made sure the court did not by inadvertence fail to realize that this decision was an adjudication on due process: she petitioned for re-

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there is some merit to recognizing a distinction between mental illness and incompetency. Pet. App. 27a.

[18] In the lower Florida courts, RI, 60-¶1; RI, 61-¶¶B, 2; RI, 93-¶¶5, 7.

[19] "The appellant's principal contentions here are (1) that neither the guardian nor its attorneys are entitled to compensation because the entire guardianship proceedings were null and void***" (Pet. App. 25a).

[20] "The other questions presented here by the appellant have been considered and no reversible error has been found" (Pet. App. 30a).

hearing, retendering that issue in those very words.[21] When the court, unmoved, rejected that petition (RI, 118), there could no longer be any further doubt that its fee awards were an unequivocal answer to the questions of voidness petitioners now say were never passed upon.

Still persisting, she made the same contentions again a couple of years later in 1960, when she appealed the attorney fee order entered on the remand;[22] and again the state court awarded compensation notwithstanding (RI, 167, 173).

(2) If the petitioner wife deemed herself fobbed off by the Florida Supreme Court's failure to agree with her that voidness of the guardianship proceedings precluded award of compensation, she threw the contention of voidness away by failure then to press it to this Court by certiorari. As the District Court stated it:

> "Plaintiff seeks to apply the doctrine that a void judgment is open to collateral attack at any time. But this doctrine is itself subject to the limitation that there can be only one attack on even a void judgment, for an unsuccessful or abandoned attack becomes itself an adverse adjudication" (Pet.App. 18a).

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[21] "On this point a rehearing is requested to determine whether the accomplished fact obviates the necessity of complying with the statutes and whether the taking of property, including the compensation to the guardian and its attorneys under such facts did not amount to taking property without due process of law" (RI, 114-5, our emph.).

[22] "The Court erred in allowing any compensation to Potter, Langbein & Burdick on the ground that there being no legal guardianship, any compensation to them amounts to taking property of Respondent without due process of law as provided in the Florida Constitution and the 14th Amendment to the U. S. Constitution" (Assignment #38, RI, 164, our emph.).

The District Court rested its view on citation of a few of the many cases on that point. *Grubb v. Public Utilities Comm.*, 281 US 470;[23] *Am. Surety Co. v. Baldwin*, 287 US 156, 164-6.[24] *Angel v. Bullington*, 330 US 183.[25] Obviously the District Court selected these three cases because in each of them the adverse decision on a mere tender of the 14th Amendment question was held to bar, although the state court no more than here used 14th Amendment language.

This group of cases does not stand alone. It is settled in the law of judgments that a court which has the parties or their privies [26] before it has jurisdiction to determine its own jurisdiction against a charge that the proceedings before it are void, and this makes its determination immune to collateral attack even were it erroneous. *Forsyth v. Hammond*, 166 US 506; *Baldwin v. Iowa State Travelling Men's Assn.*, 283 US 522; *Stoll v. Gottlieb*, 305 US 165; *Chicot County Drainage Dist. v. Baxter State Bk.*, 308 US 371; *Durfee v. Duke*, 375 US 106. And it is equally settled, as a matter of the jurisdiction of federal district courts, that a litigant who has lost a constitutional argu-

[23] "The question of the constitutional validity of the order was distinctly presented by the appellant's petition and necessarily was resolved against him by the judgment affirming the order. Omitting to mention that question in the opinion did not eliminate it from the case or make the judgment of affirmance any the less an adjudication of it," 281 US, at 477-8.

[24] "Having invoked the state procedure which afforded the opportunity of raising the issue of lack of notice, the Surety Company cannot utilize the same issue as a basis for relief in the federal court. Federal claims are not to be prosecuted piecemeal in state and federal courts***," 287 US, at 169.

[25] "[T]he decision of the North Carolina Supreme Court concluded an adjudication of a federal question even though it was not couched in those terms," 330 US, at 189.

[26] While the husband asserts independent claim in the fraud and conspiracy counts, he could not claim as to the void judgment count that he is not bound by what binds his wife (cf Pet. 32-33).

ment in the highest court of a state must go to this Court direct. *Rooker v. Fidelity Trust Co.*, 263 US 413; *Trenies v. Sunshine Mining Co.*, 308 US 66, 77-8; *Warriner v. Fink*, 307 F2d 933, 936 (5th Cir); *Williams v. Tooke*, 108 F2d 758 (5th Cir).

III. There is no occasion to review petitioners' procedural claim that the question of fact whether the three-year fraud limitation term was tolled by concealment should have been left to a jury, because there was no question of fact.

Petitioners' other grievance is that the District Court failed to impanel a jury to dispose of their 1964 Rule 60(b) motion as to newly discovered evidence introduced into the record only after the basic 1963 summary judgment against them, a suggestion so boldly novel that we quote it in footnote rather than risk distortion by paraphrase.[27] If we understand this language, petitioners are saying that respondent's mere refusal to capitulate to their claim of newly discovered fraud raised issues that required the trial judge to impanel a jury. Thus they would have

[27] "The Court of Appeals below, however, proceeded to affirm the summary denial of the motion that sought to produce newly discovered evidence of fraud. And it further ruled, without the benefit of any jury determination of the disputed facts, that the alleged fraud had in fact been discovered by the petitioners as early as 1953 and hence was barred by the three-year fraud limitations period of § 95.11. See Appendix A, p. 7a, infra. In so ruling, the court below has effectively deprived the petitioners of their right to a jury determination of these fraud issues, a right guaranteed by Florida law. The denial of that right is compounded here by the decisive impact of that denial upon the running of the limitations period" (Pet. 29; see also ib 3).

him abdicate what one would have thought his ordinary duty to see whether there was any proof at all that it was actual new discovery, 6 *Moore, Federal Practice,* §59.03, and also what one would have thought his ordinary discretion to make the initial determination that the new fraud evidence was "of such a material and controlling nature as would probably induce a different conclusion", 7 *Moore, Federal Practice,* §60.23[4].

It is not necessary that we explore the District Court's factual ruling that the new evidence "establishes no fraud at all", discussed in our Supplemental Statement, supra p. 6. For the Florida law petitioners adduce in support of their assertion of conflict by no means squarely supports their position that on motion to set aside the summary judgment for newly discovered evidence they were entitled to jury trial of their contention that the fraud limitation was tolled by concealment. The case law they cite, *Metcalf v. Johnson,* 130 So2d 864, 868 (Pet. 28), turns out to be at best Florida mention of Georgia dictum in another context, hardly the sort of conflict that invites correction by exercise of this court's certiorari jurisdiction.

Moreover, in view of the underlying theme of the petition, that the ordinary standards for certiorari should be here relaxed out of alertness to the rights of the mentally ill, it has to be recognized that the facts do not permit petitioners to fairly claim that mental illness had anything to do with concealment or tolling. Although the petitioner wife's incompetency terminated in 1954 by judicial decree and the husband has never been incompetent, the substance of the alleged newly discovered facts was discovered by petitioners by 1954, and the corroborative detail docu-

ments that they saw in 1964 were available to them by 1955, years before this 1962 suit:—

(1) *The uncontradicted evidence that the alleged concealed documents were tendered for inspection.* The one specific head of new evidence that petitioners have deemed appealing enough to recite is the alleged 1954 conspiracy to rehospitalize the wife and void the petitioners' marriage (Pet. 14), reviewed supra p. 6-9.[28] But the bank files, which petitioners claim would have led them to make broader investigation and more timely suit had they known before the 1963 summary judgment what those files contained, had been many times over many years freely looked into by at least one of petitioners' present counsel, Hon. Charles M. Trammell.[29]

(a) *The trust officer's affidavit and deposition on inspection.* In May 1963, in support of the bank's motion for summary judgment, the bank's trust officer gave an affidavit to this effect, which was not denied.[30] In January 1964, after the August 1963 summary judgment, the trust

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[28]Petitioners also presented below other alleged newly discovered evidence of concealed 1953 fraud. See note 11, p. 7 supra. But since we assume that they have put their best foot forward in their petition we neither discuss the evidence they do not discuss, nor the evidence that led the Court of Appeals to point out that virtually all the facts relied upon as constituting the 1953 fraud were asserted in the 1954 collateral attack on the guardianship (Pet. App. 7a).

[29]There is also uncontradicted evidence that in 1954 the bank files had been tendered to Hon. Myles J. Lane, formerly of the wife's counsel, but he did not choose to look at them at all (RII, 82, 85).

[30]"The bank has made all of these documents available for the inspection of Mrs. Lucom's succession of attorneys" (RI, 373). The petitioner wife's reply affidavit, at the point where it dealt with those documents, did not mention their availability for inspection but only the terms under which the bank offered to part with their physical possession (RI, 370).

officer said it again in detail in deposition.[31] This provoked what petitioners' District Court briefing argued was a counteraffidavit on the point by Judge Trammell, but in this affidavit the Judge does not deny that he inspected the bank's files.[12]

(b) *The request for admissions.* Meanwhile, by request for admissions in December 1963, again after the summary judgment, the bank asserted still more specifically its offer to permit Judge Trammell to see all its files pertaining to the guardianship, and that he saw them twice in 1955, once in 1957, and on other occasions.[33] To

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[31]"A. Well, the first opportunity the plaintiffs or their counsel had to see it was when Judge Trammell came in here and wanted to see the records. We laid them before him, and the Operating File was included along with everything else. He saw the whole files when he came in here.

"Q. And precisely when was that?

"A. Way back in 1955. I can't remember the exact date" (RII, 125).

[32]This counteraffidavit, briefed by his then cocounsel as asserting that Judge Trammell "never had general access to even bank files" notwithstanding demand (RIII, 422), turns out to be the guarded statement only that no one directed the Judge's especial attention to purportedly incriminating passages of the documents he was looking at: the affiant says that the bank and its counsel "did not communicate or disclose to me all the material facts which they knew were contained in the aforesaid Exhibits" (RIII, 453).

[33]"4. The defendant bank in 1954, when Myles J. Lane was your attorney, offered to permit him, as your attorney, to inspect and examine the bank's files pertaining to the guardianship here involved without excluding any paper or document from such inspection and examination. ***

"8. The defendant bank in 1954 offered to permit your attorney Charles M. Trammell, to inspect and examine said files without any such exclusion.

"9. Your attorney, Charles M. Trammell, inspected and examined said files in May or June of 1955.

"10. Your attorney, Charles M. Trammell, inspected and examined said files in September, 1955.

"11. Your attorney, Charles M. Trammell, inspected and examined said files in January, 1957.

"12. Your attorney, Charles M. Trammell, inspected and examined said files on numerous other occasions" (RII, 10-11).

this petitioners supplied a weasel-worded response, denying not the facts of this tender and its acceptance but denying only petitioners' knowledge of those facts.[34]

The response is verified by petitioners and additionally by Judge Trammell, who swears that the response "is true and correct to the best of my knowledge and belief, and as to those matters contained therein which relate to my activities, the same are true and accurate to my own knowledge" (RII, 107-8). But his verification of the response, even as to his own activities, adds nothing to the response, because of the fact just noted, that the response itself is only a denial of knowledge rather than of fact. This is no denial at all. 4 *Moore, Federal Practice*, §36.05[4]. All the petitioners are swearing to, as to the bank's offer of inspection to this lawyer and his acceptance, is that they are ignorant of what happened; and all the lawyer swears to is that he believes petitioners are ignorant of what their other lawyers did and that he knows petitioners are ignorant of what he did. All this is doubtless literal truth, and equally doubtless evasion, on the part of both lawyer and clients, because none of the three denies the fact that such an offer was made and accepted.[35]

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[34]"4. Re request #4, plaintiffs have no knowledge of any such offer having been made, and for that reason deny same. * * * Re request #8, plaintiffs have no knowledge of any such offer having been made and for that reason deny same. Re requests 9, 10, 11, and 12, plaintiffs know of no instance when said attorney was permitted to or did 'examine the bank's files pertaining to the guardianship here involved without excluding any paper or document from such inspection and examination' and accordingly for that reason deny same" (RII, 105).

[35]We have not here belatedly seized on an inadvertence of phrasing. We made this same point in the District Court, when petitioners had opportunity to correct these papers if correctible (RIII, 594). Petitioners chose to let them stand.

(c) *The answers to interrogatories.* The petitioner wife, responding to the bank's interrogatories (not printed: see RI, 522), gave sworn answers that in some instances deny the offer of inspection (RIII, 570-3). But her general denial answer: "***no offer of general inspection was ever made" is inadmissible hearsay, viz., "*** upon information and belief" (RIII, 570); and her specific denials as to 1954 and 1961 offers (RIII, 571) do not meet the specific testimony of 1955 offer (RII, 125, supra p. 21 n. 31). At that, it is elementary that no interrogatory answers are admissible in the answering party's favor. 4 *Moore, Federal Practice,* §33.29[1].

So nowhere is there an effective evidential denial of offer of inspection and its acceptance, twice asserted under oath by affidavit and deposition and then twice evaded in counteraffidavits, and twice more evaded by response to request for admissions and by interrogatory answers.

Under any head of FRCP 60(b), to reopen a judgment there must be "due diligence timely to obtain the evidence now offered", *Knight v. Hersh,* 313 F2d 879 (D.C.Cir); *Philippine Natl. Bk. v. Kennedy,* 295 F2d 544 (D.C.Cir). Failing to look at or comprehend documents that have been all along available for the looking is not due diligence. *Gill v. United States,* 184 F2d 49 (2dCir).

(2) *The uncontradicted evidence that petitioners independently knew the facts reflected on the documents.* Even had there been contradiction or mitigation of this evidence on inspection of the bank's files, petitioners' claim as to evidence newly discovered after the summary judgment would be no better founded, for these files merely

corroborated and cumulated facts petitioners already knew. Quite apart from what their attorneys knew, petitioners personally knew these facts completely in 1963 before the 1963 summary judgment, and in essential part as far back as 1954, although the record leaves it to speculation whether in 1954 they also knew the whole or just a little less than the whole: —

As part of their own papers submitted in 1963 when they were trying to ward off the summary judgment, petitioners themselves introduced into this record a document already mentioned, supra p. 8 n. 12, viz., a partial transcript of a 1954 hearing at which the wife's personal physician had testified to the relapse, to his opinion that the relapse was in some measure the new husband's fault, and to his recommendation for personal guardianship and for possible recommitment (RI, 427, 456-7, 462-5). Within a few days of this hearing petitioners' messenger actually reported to the bank their fear that they might be "locked up" if they came back to Florida (RII, 134-5, 256).

Finally, the wife's own deposition testimony, taken in May 1963 before the summary judgment, makes plain that by the end of 1954 petitioners had already put all these pieces together and convinced themselves there was a conspiracy. In this testimony she admitted that it was in 1954 that her young daughter Isobel had reported to both petitioners that she had overheard a "private meeting" at which the son and his alleged coconspirators were plotting to put her back in the mental hospital and her new husband in jail (RI, 255-6, 294-5; see also RI, 304).

Hence although it was new to the record in 1964, after

the 1963 summary judgment, that there was documentary evidence of which petitioners were ignorant, and even assuming that that evidence—the trial judge to the contrary notwithstanding: "no fraud at all" (RIII, 609)—was fraudulently concealed and thereby hid a cause of action, the cause of action was not new to petitioners. They had known the substance if not the detail for years, and they had passed up over those years repeated tender of the detail:

> "A concealment which no longer conceals the cause of action will not continue to toll the statute, though the full facts may not yet have been disclosed", *Phillips Petro. Co. v. Johnson*, 155 F2d 185 (5thCir).

So too under Florida law, as the Court of Appeals pointed out, once the invasion of the claimed right was discovered, any tolling ceased even though the detail was not yet discovered. *Buck v. Mouradian*, 100 So2d 70 (3dDFla1958), cert. den. 104 So2d 592 (Fla1958), cited below (Pet.App. 6a).

* * *

CONCLUSION

Petitioners' attempt to use claim of constitutional infringement of the "right of those confined for reasons of mental illness" (Pet. 16), to add importance to this petty wrangle over choice of state limitation statutes, has no basis in the facts of the case. It was some nine years before start of the instant suit that the wife, the mentally ill person involved, was released from the mental hospital,

some eight years since she was adjudicated restored to competency, and some seven years since she lost the first battle in her long war on the bank (Pet. 11; RI, 70, 75). This lady has thus been for all that time free in fact and in law to vindicate her constitutional rights, and during all these years she has employed able counsel to do so.

Her accusations, rejected by the Florida courts and the courts below, fail likewise to meet the tests for exercise of this Court's certiorari jurisdiction. The decision below barring the cause of action for acting under an alleged void guardianship involves nothing but a question of state limitation law. The decision barring the causes of action for fraud and conspiracy involves nothing additional except recognition of undisputed factual detail as to petitioners' prior knowledge of alleged newly discovered evidence. None of those matters is of dimension to merit certiorari review. The petition should therefore be denied.

Respectfully submitted,

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APPENDIX

Florida Statutes, §744.03(5)[1]

An "incompetent" is any person who, because of minority, senility, lunacy, insanity, imbecility, idiocy, drunkenness, excessive use of drugs or other physical or mental incapacity, is incapable of either managing his property or caring for himself, or both.

Florida Statutes, §744.61[2]

All suits, actions or proceedings to establish the validity and amount of claims against the estate of the ward shall be brought jointly against the guardian and the ward, and in any such suit no guardian ad litem need be appointed. Suits to enforce or to declare rights of the ward shall be brought jointly in the name of the guardian and the ward. If suit is brought by the guardian against the ward or vice versa or if the interest of the guardian is adverse to that of his ward, then a guardian ad litem shall be appointed by the court to represent the ward in that particular litigation. Judgments in favor of the ward shall, upon termination of guardianship, become the property of the ward without the necessity for any assignment by the guardian or receipt by the ward. The guardian may receive payment and satisfy any judgment in behalf of the ward without any joinder of the ward.

Florida Statutes, §746.13(2)[1]

The guardian applying for discharge is authorized to retain from the funds in his possession a sufficient amount

[1]Cited supra p. 3.
[2]Cited supra p. 13.
[1]Cited supra p. 14.

to pay the final costs of administration accruing between the filing of his final returns and the order of discharge.

Pennsylvania Public Law 612, June 28, 1951, §102(3)[2]

"Incompetent" means a person, who, because of mental infirmities of old age, mental illness, mental deficiency, drug addiction or inebriety, is unable to manage his property, or is liable to dissipate it or become the victim of designing persons. It includes a person heretofore declared to be a lunatic, an habitual drunkard, insane or weak-minded.

Pennsylvania Public Law 612, June 28, 1951, §301[3]

(a) Resident. The court, upon petition and a hearing at which good cause is shown, may find a person domiciled in the Commonwealth to be incompetent and appoint a guardian or guardians of his estate. The petitioner may be the alleged incompetent's spouse, a relative, a creditor, a debtor, or, any person interested in the alleged incompetent's welfare. Notice of the petition and hearing shall be given, in such manner as the court shall direct, to the alleged incompetent, to all persons residing within the Commonwealth who are sui juris and would be entitled to share in the estate of the alleged incompetent if he died intestate at that time, and to such other parties as the court may direct. The alleged incompetent shall be present at the hearing unless (1) the court is satisfied, upon the presentation of positive testimony, that, because of this physical or mental condition, his welfare would not be pro-

[2]Cited supra p. 3.
[3]Cited supra p. 4.

moted by his presence; or (2) it is impossible for him to be present because of his absence from the Commonwealth. It shall not be necessary for the alleged incompetent to be represented by a guardian ad litem in the proceeding.

(b) Nonresident. The court may find a person not domiciled in the Commonwealth having property in the Commonwealth to be incompetent and may appoint a guardian of his estate. The appointment may be made after petition, hearing and notice as in the case of a person domiciled in the Commonwealth, or upon the submission of an exemplified copy of a decree establishing his incompetency in another jurisdiction. The court shall give preference in its appointment to the foreign guardian of the nonresident incompetent unless it finds that such appointment will not be for the best interests of the incompetent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 123

VIRGINIA WILLYS LUCOM and WILSON C. LUCOM,
Petitioners,

v.

ATLANTIC NATIONAL BANK OF WEST PALM BEACH, FLORIDA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Significantly, the respondent's Brief in Opposition addresses itself mainly to factual and legal matters not involved in the Fifth Circuit's opinion or in the Petition for a Writ of Certiorari. By labeling the central issue before this Court as "a minor question under state statutes of limitation" (Opp. Br. 1)

and as a "petty wrangle over choice of state limitation statutes" (Opp. Br. 26), the respondent would have this Court ignore an egregious violation of the basic principle of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64—the obligation of federal courts to follow the applicable rule of law announced by state courts.

Respondent devotes itself factually (Opp. Br. 2-8) to disputed matters whose conceivable relevance could only be determined if this case were allowed to come to trial. In terms of the limitations question resolved by the Fifth Circuit, however, there is but one indisputable and critical fact, i.e., the fact mentioned in the opinion below (Pet. App. 2a) that the guardian's final discharge did not occur until 1961, less than one year before this suit was brought. Respondent does not and cannot deny that fact. And respondent does not answer or respond to the decision of the Florida Supreme Court in *Beck* v. *Barnett National Bank*, 142 So. 2d 329 (Fla.), holding that just such a suit as this, brought by a former ward against a guardian who has been finally discharged, is controlled by the special one-year limitation period of Fla. Stat. § 746.14. The *Beck* decision thus flatly contradicts the interpretation of Florida law made by the Fifth Circuit in this case. See Petition, pp. 21-23. And that undenied conflict, without more, warrants the grant of certiorari.

There are certain additional statements and misconceptions in the Brief in Opposition that warrant summary comment:

(1) The deference which this Court normally pays to local law decisions of federal judges depends upon something more substantial than their residence in the state whose local law is in issue or their supposed ex-

perience with that law. See Opp. Br. 11. *If there is no guidance to be had from the state court decisions* and if the determination of the federal judges seems reasonable under the circumstances, this Court usually leaves undisturbed the interpretation of the federal judges who are experienced in the state law. See *MacGregor* v. *State Mutual Life Assurance Co.*, 315 U.S. 280, 281. But the "highest court of the state is the final arbiter of what is state law . . . [and when] it has spoken, its pronouncement is to be accepted by federal courts as defining state law . . ." *West* v. *American T. & T. Co.*, 311 U.S. 223, 236. Hence if the federal judges, experienced though they may be in local law matters, fail to follow state law as expressly defined by the highest state court, their determination must be considered plainly erroneous and clearly wrong. Such an erroneous interpretation of state law, as the *West* case illustrates with respect to a matter of state limitations law, clearly gives rise to review and correction by this Court.

(2) The major question thus presented to this Court is the correctness of the Fifth Circuit's interpretation of the Florida limitations law and its application to the undisputed facts of this case. Contrary to respondent's suggestion (Opp. Br. 11), it is necessary "to rehash the Florida case law discussed in the opinions below"—for once that "rehash" is undertaken, the completely erroneous and therefore reviewable nature of the decision below becomes clear.

In short, the Fifth Circuit failed to follow and apply the decisions of the Florida Supreme Court which hold: (a) special statutes control over general statutes, *Adams* v. *Culver,* 111 So. 2d 665; (b) the special one-year limitation period following the guardian's final discharge, as set forth in Fla. Stat. § 746.14,

thus controls here, even though for sake of argument the claim may be barred under the general limitations statute, *Beck* v. *Barnett National Bank,* 142 So. 2d 329 (Fla.); and (c) in any event, even if the general limitations statute applied and regardless of whether suit is permissible during the guardianship, a former ward can sue his former guardian in any appropriate action *after* the guardian's final discharge, which occurred here in 1961, *Beck* v. *Barnett National Bank,* 117 So. 2d 45 (Fla. App.), and 142 So. 2d 329 (Fla.); *American Surety Co.* v. *Andrews,* 12 So. 2d 599 (Fla.). This latter Florida rule, permitting suit after final discharge, was in effect long before the adoption of the special limitations statute, § 746.14, which placed a limitation of one year *after* final discharge.

(3) Moreover, as developed in the Petition, pp. 27-28, Florida law unqualifiedly provides that a void order or judgment may be attacked collaterally *at any time* and set aside in an appropriate proceeding. See, e.g., *Johnson* v. *McKinnon,* 45 So. 23 (Fla.). Here the petitioners have attacked the validity of the Florida judge's appointment of the respondent as guardian, alleging a jurisdictional lack of an authenticated adjudication of mental incompetency. Respondent's attempt (Opp. Br. 5-6) to avoid the force of that contention by reliance on *In re Cameron's Estate,* 158 Fla. 91, 28 So. 2d 110, is ill-founded. Unlike the *Cameron* case, where there was a valid out-of-state adjudication of incompetency by a court having jurisdiction over a Florida resident domiciled in the other state, there was here no adjudication of mental incompetence by any court, either in Pennsylvania or Florida, having jurisdiction over the petitioner wife. Absent such a judicial determination of incompetence,

the Florida judge lacked jurisdiction under Florida statutes (see Fla. Stat. § 744.19 and § 744.31) to appoint the respondent as guardian. And that jurisdictional defect can be attacked at any time under Florida law, there being no limitations period for such an attack.

(4) Respondent's assertion that the attack on the void guardianship comes too late by virtue of the failure to raise the issue earlier on certiorari to this Court (Opp. Br. 15) is without foundation. In point of fact, the earlier attack on the guardianship in the Florida courts was premised, as the Fifth Circuit here noted (Pet. App. 2a), solely "on the basis that the guardianship was invalid for lack of compliance with Florida law." And the Florida Supreme Court, as the Fifth Circuit further noted (Pet. App. 2a), "expressly omitted ruling on the validity of the appointment, holding that the bank was at least a guardian de facto and, as such, was entitled to be paid."

Thus there was neither an attack upon the guardianship in federal constitutional terms nor any ruling at all upon the validity of the guardianship; in those circumstances an attempt to secure certiorari from this Court would have been misplaced. The failure to make such a futile attempt certainly cannot be said to foreclose any present effort by petitioners to question the validity of the guardianship under federal standards.

(5) With respect to respondent's assertion (Opp. Br. 19) that there were no questions of fact justifying a jury determination of whether the three-year fraud limitation period was tolled by concealment, it need only be said that respondent's own version of what it calls "uncontroverted evidence" (Opp. Br. 21-26)